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In This Edition

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Tuesday, July 12, 2016

Administrative Rules Review Committee
9:00 a.m., Room 116, Statehouse

Service Committee of the Legislative Council
Room 22, Statehouse, time to be announced

Studies Committee of the Legislative Council
Room 22, Statehouse, time to be announced

Legislative Council
Room 22, Statehouse, time to be announced

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Administrative Rules Review Committee
Chairperson: Senator Wally Horn
Vice Chairperson: Representative Dawn Pettengill
Location: Room 116, Statehouse
Date & Time: Tuesday, July 12, 2016, 9:00 a.m.
LSA Contacts: Jack Ewing, Legal Services, (515) 281-6048; Tim Reilly, Legal Services, (515) 725-7354
Agenda: https://www.legis.iowa.gov/law/administrativeRules/arrc/agenda

Service Committee of the Legislative Council
Chairperson: Senator Michael Gronstal
Vice Chairperson: Representative Linda Upmeyer
Location: Statehouse, Room 22
Date & Time: Tuesday, July 12, 2016, time to be announced
Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566, Richard Johnson, Legal Services, (515) 281-3566
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/committees/committee?ga=86&groupID=662

Studies Committee of the Legislative Council
Chairperson: Senator Michael Gronstal
Vice Chairperson: Representative Linda Upmeyer
Location: Statehouse, Room 22
Date & Time: Tuesday, July 12, 2016, time to be announced
Legislative Services Agency Contacts: Richard Nelson, Legal Services, (515) 242-5822, Andrew Ward, Legal Services, (515) 725-2251
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/committees/committee?ga=86&groupID=663

Legislative Council
Chairperson: Representative Linda Upmeyer
Vice Chairperson: Senator Michael Gronstal
Location: Statehouse, Room 22
Date & Time: Tuesday, July 12, 2016, time to be announced
Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566, Richard Johnson, Legal Services, (515) 281-3566
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/committees/committee?ga=86&groupID=703

ADMINISTRATIVE RULES REVIEW COMMITTEE

June 14, 2016

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

EMERGENCY RULE FILING REVIEWS. Iowa Code section 17A.4(3) provides that an agency can adopt a rule without notice only with specific statutory authority or with prior approval by the Administrative Rules Review Committee. Under this procedure, the committee reviews requests by agencies to adopt rules filed without notice at its monthly meeting or at special meetings if necessary. The committee will approve such filings if the committee finds good cause that notice and public participation would be unnecessary, impracticable, or contrary to the public interest.

The committee considered two filings:

Department of Public Health—*State Plumbing Code*. EMERGENCY FILING APPROVED BY COMMITTEE.

Workers' Compensation Division—*2016 Payroll Tax Tables*. EMERGENCY FILING APPROVED BY COMMITTEE.

HUMAN SERVICES DEPARTMENT, *Mental Health Advocates*, 3/16/16 IAB, ARC 2438C, ADOPTED, HELD OVER FROM APRIL.

Background. These rules establish standards for mental health advocates who provide services under Iowa Code chapter 229, as amended by 2015 Iowa Acts, HF 468. Prior to July 1, 2015, mental health advocates were appointed by the judicial branch and paid by the counties. HF 468 made mental health advocates county employees effective July 1, 2015. Prior to July 1, 2015, procedures varied from judicial region to judicial region and from county to county. The rules establish statewide requirements for hiring the advocate and for performance standards. They include standards for definitions, appointment and qualifications, assignments, advocate and county responsibilities, data collection requirements, and quality assurance.

At the committee's April meeting, the committee placed a 70-day delay on a portion of this rulemaking, rule 441—25.106 relating to data collection, and scheduled additional review for the June meeting. Committee members questioned the purpose of collecting the data described in the rule, how the data would be used, the cost of collecting the data, and whether such data collection should be retroactive. The rest of ARC 2438C became effective on May 1, 2016.

Commentary. Department and Mental Health and Disability Services Commission representatives Ms. Nancy Freudenberg, Mr. Rick Shults, Mr. Patrick Schmitz, and Ms. Theresa Armstrong explained that the department and the commission, in consultation with stakeholders including the Iowa State Association of Counties, will be proposing new rules on this subject in response to feedback the department has received on ARC 2438C. The new rules will provide for aggregate data collection and a modified reporting date. The representatives noted that the department and commission will need to begin a new rulemaking process, so resolution of this matter will not be immediate.

Public comment was heard from mental health advocates who urged the department to allow advocates to have input in the new rulemaking. Committee members urged this as well. Mr. Shults stated that advocates would have the opportunity to offer public comments during the rulemaking process.

A motion was made for a session delay on rule 441—25.106 to ensure that it would not take effect before the new rulemaking is completed.

Action. A motion for a session delay on rule 441—25.106 passed on a short-form vote (seven votes required to pass).

HUMAN SERVICES DEPARTMENT, *Process for Approving Subacute Mental Health Care Facility Licensing Applications to the Department of Inspections and Appeals*, 5/25/16 IAB, ARC 2550C, NOTICE.

Background. These proposed rules establish the process by which the Department of Human Services (DHS) will approve licensing applications to the Department of Inspections and Appeals (DIA) for subacute mental health care facilities. The rules also establish the process to determine the disbursement of 75 beds to the most qualified providers. Under Iowa Code chapter 135G, DIA is responsible for licensing subacute care facilities, and DHS must approve the licensing application based on the established process, which must identify the most qualified providers and geographically disperse no more than 75 beds.

Subacute services are one of the additional core services to be provided by Mental Health and Disability Services (MHDS) regions when public funds become available. Some MHDS regions and providers are interested in developing subacute services provided in a subacute care facility.

(Administrative Rules Review Committee continued from Page 3)

Commentary. After DHS representative Ms. Freudenberg explained the background of this rulemaking, the committee heard public comment from Mr. Doug Struyk on behalf of the Iowa Council for Health Care Centers. He expressed concern that these rules might require facilities to take individuals who might be challenging or even dangerous to care for. He questioned whether facilities would receive higher reimbursement rates for taking these challenging individuals. He also questioned whether facilities would be required to have psychiatrists on the premises at all times for individuals requiring medication on an as-needed basis.

Department representative Mr. Shults responded that DIA is responsible for licensing these facilities and for setting standards for services provided by the facilities, so DIA would be the appropriate department to address some of these concerns. Committee members asked him who sets the reimbursement rates for these facilities, and he explained that they are set either through Medicaid or through negotiation with the MHDS regions. Regarding challenging individuals, he explained that a facility has the responsibility to make safety determinations and to not accept individuals it cannot safely care for. He also noted that subacute facilities would not admit individuals who require higher levels of care. Committee members asked what subacute facilities there are currently in Iowa, and he replied that there are none and that patients requiring subacute care are currently placed in other facilities.

Action. No action taken.

HUMAN SERVICES DEPARTMENT, *Child Care Centers,* 5/25/16 IAB, ARC 2554C, NOTICE; *Child Development Homes,* 5/25/16 IAB, ARC 2553C, NOTICE; *Child Care Homes,* 5/25/16 IAB, ARC 2552C, NOTICE; *Child Care Assistance Eligibility—In-Home Care, Nonregistered Providers,* 5/25/16 IAB, ARC 2551C, NOTICE.

Background. These proposed rules implement changes to the federal Child Care and Development Block Grant (CCDBG), which was reauthorized in November 2014. As a result of the changes, there are new federal laws outlining health, safety, and fire standards for child care providers that receive child care assistance dollars.

ARC 2553C rewrites requirements for child care providers that receive subsidy dollars and are required by state law to register with the department to provide child care. ARC 2552C outlines new requirements for child care providers that receive subsidy dollars but are not required by state law to register with the department. ARC 2554C and 2551C include additional conforming amendments relating to the CCDBG, as well as other technical changes and updates to the department's rules on child care providers.

Commentary. Committee members had questions regarding the training described in ARC 2554C. Department representatives Ms. Freudenberg and Ms. Ryan Page explained that training content and providers must be approved by the department. They stated that training will be phased in for existing provider staff and required for all new staff beginning October 1, 2016. They also stated that training is available online at no cost, takes 12 hours, and is divided into different modules that can be taken separately. Committee members asked how training requirements would apply to child care centers located in schools, and the representatives replied that they would follow up with that information.

During discussion of ARC 2552C, committee members asked if these proposed rules exceed federal requirements. Ms. Page replied that these rules are a combination of existing state requirements and the new federal requirements. She stated that the department has cut unnecessary requirements where possible. She also stated that these rules are not intended to push unregistered providers to register with the department.

Discussion was also had regarding language on cribs and other child sleeping arrangements. Public comment was received from providers praising the department's work on this matter and urging the department to pay attention to the needs of high-risk children and rural communities.

Action. No action taken on any of these rulemakings.

PUBLIC HEALTH DEPARTMENT PROFESSIONAL LICENSURE DIVISION, *Specific Minimum Standards for Appropriate Supervision of a Physician Assistant by a Physician,* 5/11/16 IAB, ARC 2531C, AMENDED NOTICE.

MEDICINE BOARD, *Specific Minimum Standards for Appropriate Supervision of a Physician Assistant by a Physician,* 5/11/16 IAB, ARC 2532C, ADOPTED.

Background. 2015 Iowa Acts, SF 505, section 113, required the Board of Physician Assistants (BPA) and the Board of Medicine (BM) to "jointly adopt rules… to establish specific minimum standards or a definition of supervision for appropriate supervision of physician assistants by physicians."

BM filed its Notice of Intended Action on this joint rulemaking as ARC 2372C, published in the January 20, 2016, bulletin. BM voted to adopt and file the rules with several changes from the noticed version on April 15, 2016. The rules were set to become effective June 15, 2016.

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On behalf of the BPA, the Department of Public Health's Professional Licensure Division filed its noticed rules as ARC 2417C, published on February 17. BPA filed this amended notice for rulemaking.

The joint rules, as published in ARC 2531C and ARC 2532C, are now essentially identical.

Commentary. Ms. Sarah Reisetter, Bureau Chief, Professional Licensure Division, spoke on behalf of BPA. She stated that the only positive comments BPA has received have come from the Iowa Medical Society. The majority of comments have expressed opposition to the rules, generally related to the perception of a resulting overall negative impact to patient care in rural areas. Some commenters wondered why these rules are needed in tandem with BM, as the prior rules were viewed as satisfactory for several years. Ms. Reisetter also cited a claim from the American Academy of Physician Assistants that these rules would impose a $2.9 million "burden" on the state's health care system.

Mr. Mark Bowden, Executive Director, BM, spoke regarding ARC 2532C. He commented that the rules as proposed are generally the same as those currently in effect for BPA, even though BPA is now resistant to these proposed rules. Mr. Bowden expressed doubt as to whether BM would be willing to renegotiate these joint rules with BPA if BPA does not adopt them in their current form.

A committee member asked what would happen if BPA chooses not to adopt the rules in their current form. Committee legal counsel commented that the BM rules would be in effect, except for the amendment and waiver provisions, since those would require approval by both BM and BPA. Another committee member requested that committee legal counsel study whether current BPA rules are in compliance with what BM has adopted and would satisfy the requirements of SF 505.

Action. No action taken on either rulemaking.

Next meeting. The next committee meeting will be held in Room 116, Statehouse, on Tuesday, July 12, 2016, beginning at 9:00 a.m.

LSA Staff: Jack Ewing, LSA Counsel, (515) 281-6048; Tim Reilly, LSA Counsel, (515)725-7354.

Internet Site: https://www.legis.iowa.gov/committees/committee?endYear=2015&groupID=705

LEGAL UPDATES

Purpose. *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other interested persons of legislative issues that are the subject of state court and federal district court decisions and regulatory actions, United States Supreme Court decisions, and Attorney General Opinions, including issues involving the constitutionality and interpretation of statutes adopted by the General Assembly. Although a briefing may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

WORKERS' COMPENSATION—PAYMENT OF MEDICAL EXPENSES—NO AUTHORIZATION OR CAUSAL CONNECTION

Filed by the Iowa Supreme Court
April 15, 2016

Ramirez-Trujillo v. Quality Egg, L.L.C.

No. 14-0640

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20160415/14-0640.pdf

Facts. In 2009, employee Ramirez-Trujillo slipped on an egg at work and injured her back. Her employer, Quality Egg, L.L.C., acknowledged liability for the injury and paid for medical treatment of the injury until September 2009 when she was released to full duty with no work restrictions. Later, the employee brought a workers' compensation claim seeking additional workers' compensation benefits and reimbursement of medical expenses for back treatment in 2010 and 2011. Quality Egg argued that it did not authorize the additional medical treatment and that the treatment was not causally connected to the employee's workplace injury.

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Workers' Compensation Commission Hearing and Appeal. A Deputy Workers' Compensation Commissioner issued an arbitration decision concluding that Ramirez-Trujillo's condition in 2010 and 2011 was not the result of her work injury and denying her claims for workers' compensation benefits and medical expenses incurred after September 2009. On appeal, the Workers' Compensation Commissioner (Commissioner) affirmed the deputy's conclusion that Ramirez-Trujillo's condition in 2010 and 2011 was not causally related to her 2009 workplace injury and she was not entitled to further workers' compensation benefits. However, the Commissioner held that Quality Egg was liable to pay for her medical expenses during that time because the expenses were incurred while seeking care from providers authorized by Quality Egg and Quality Egg had failed to notify her that it was no longer authorizing medical care as required by Iowa Code section 85.27(4).

Judicial Review of Agency Decision. On judicial review, the district court affirmed the final agency decision in part and reversed in part. The district court agreed that Ramirez-Trujillo's condition after 2009 was not causally related to her work injury but concluded that the Commissioner had misinterpreted Iowa Code section 85.27(4). The district court found that Quality Egg reasonably believed that Ramirez-Trujillo had recovered from her work injury and would not seek further treatment after September 2009, and that Quality Egg did not receive notice that Ramirez-Trujillo was seeking further care for her work injury. The district court thus found that Quality Egg was not liable for medical expenses incurred after 2009.

Court of Appeals Decision. On appellate review, the Court of Appeals affirmed the portion of the district court judgment which found that Ramirez-Trujillo's condition after September 2009 was not causally related to her work injury. However, the Court of Appeals concluded that the district court had erroneously interpreted Iowa Code section 85.27 (4) and reinstated the Commissioner's ruling that Quality Egg was liable to pay for Ramirez-Trujillo's medical expenses in 2010 and 2011. Both parties sought further review of the Court of Appeals decision.

Application for Further Review. In granting the Application for Further Review, the Supreme Court (Court) chose to review only the issue concerning the proper interpretation of Iowa Code section 85.27(4).

Issue. Whether the Commissioner was correct in concluding that employer Quality Egg was liable to pay for employee Ramirez-Trujillo's medical expenses which were not causally related to her work injury, when the expenses were incurred while the employee sought care from providers authorized by Quality Egg and Quality Egg failed to notify her that it was no longer authorizing medical care as required by Iowa Code section 85.27(4).

Holding. An employer is liable for the cost of care an employee receives from an authorized medical provider unless the employer shows that it gave the employee actual notice of a change in authorization as required by Iowa Code section 85.27(4) or proves, by a preponderance of the evidence, that the employee knew or reasonably should have known either that the care was unrelated to the medical condition upon which the employee's claim for workers' compensation benefits was based or that the employer was no longer authorizing the care at the time the employee received it.

Analysis. Iowa Code section 85.27(4) provides in pertinent part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization [emphasis added].

Scope of Review. At issue in this case is how the Legislature intended the second sentence of the statute to modify the right of employers to choose care for injured employees. The Court observed that the Legislature enacted the first sentence in Iowa Code section 85.27(4) granting employers a right to choose care in 1976. The second sentence of that subsection was enacted in 2004.

The Court opined that it would not defer to the Commissioner's interpretation of the statute, noting it was not "firmly convinced" the Legislature intended to delegate interpretative authority to the Commissioner. To determine legislative intent, the Court looked at the language of the statute. The Court also concluded that reasonable persons could disagree as to the meaning of the statute, allowing the Court to consider rules of statutory construction in its interpretive analysis.

Employer's Right to Choose Care. The Court found that in enacting the right-to-choose provision in Iowa Code section 85.27(4), the Legislature sought to balance the interests of injured employees against the competing interests of

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their employers. An employer obtains the right to choose medical care only by conceding the compensability of the claimed injury. This does not mean that the employer cannot disagree with the employee as to the nature or extent of the disability caused by a workplace injury. But if the right to choose care is exercised, the employer is responsible for the cost of that care up to the time the employer notifies the employee that it is no longer authorizing such care and the reason for the change.

The Court found that an employer's power to choose care includes the responsibility to monitor the care to determine when further care will no longer be authorized. The statute does not obligate employees to investigate or inquire as to whether an authorization remains in force before seeking care. The obligation rests on the employer who authorizes care to pay the costs of that care until the employer notifies the employee that it is no longer authorizing care.

However, the Court also found that employer liability under the statute is premised upon an employer's choice of care for a particular injury. The Legislature did not intend an employer who acknowledges the compensability of a foot injury to be liable for expenses the employee incurred after getting the flu merely because the care was provided by a provider authorized by the employer.

Limitations on Employer's Liability. The Court found that Iowa Code section 85.27(4) limits employer liability for authorized care to expenses related to care for the medical condition for which the employee sought care after a workplace injury and upon which the employee's claim for workers' compensation benefits is based. The statute does not permit an employee to take advantage of an employer by seeking compensation after the fact for care the employee knew or should have known was not within the scope of the employer's prior authorization. The statute does not require an employer to notify an employee it is no longer authorizing care when the employee knows or reasonably should know that the care sought is for a condition unrelated to a compensable workplace injury or that the prior authorization is no longer in effect.

The Court concluded that in order to avoid liability for care, an employer must give the employee actual notice of a change in authorization as required in Iowa Code section 85.27(4). However, the Court also concluded an employer may prove it is not liable for the cost of care an employee received from an authorized medical provider despite the employer's failure to give the notice required by the statute under limited circumstances.

Totality of Circumstances Standard. Under limited circumstances, the employer may prove the employee had knowledge of facts and circumstances that would have led a reasonable employee to conclude the employer was no longer authorizing care for the claimed injury. The determinative question is whether the totality of the circumstances indicates the employee knew or should have known the employer no longer authorized the care the employee received, not whether the employee believed the care was compensable when the employee received it.

The Court further specified what facts and circumstances should be considered by the Commissioner in determining whether an employee knew or reasonably should have known the employer no longer authorized the care the employee received at the time the employee received it. These facts and circumstances are: 1) the method in which the employer communicated to the employee that care was authorized throughout the period during which the employer concedes care was authorized; 2) the actual communications between the employer and employee throughout that period and thereafter concerning the injury, the care, and the costs of the care; 3) any communications between the employee and medical providers; 4) how much time passed between the date the employer authorized care and the date the employee sought the disputed care; 5) the nature of the injury for which the employer authorized care; 6) the nature of the care the employee received, including the overall course of the care and the frequency with which the employee sought or received care throughout the period during which the employer conceded care was authorized and thereafter; and 7) any other matters shown by the evidence that bear on what the employee knew or did not know with respect to the question of whether the employer authorized the care sought when the employee received it.

Remand. The Court remanded the case with instructions to the Commissioner to determine whether Quality Egg proved by a preponderance of the evidence that Ramirez-Trujillo knew or reasonably should have known Quality Egg no longer authorized further care for her back injury when she incurred the disputed medical expenses.

Dissent. One justice dissented. The dissent opined that Iowa Code section 85.27(4) is not ambiguous. The Commissioner correctly applied the clear language of the statute and concluded that Quality Egg is obligated to pay for medical expenses Ramirez-Trujillo incurred for treatment by the authorized provider after September 2009 because Quality Egg failed to notify her that further treatment by that provider was not authorized.

The dissent further opined that the majority's new standard for determining whether an employer's authorization of care can terminate notwithstanding the employer's failure to notify the injured employee of the termination is not found

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in the statute and is incompatible with the clear language of the statute. The new standard will create confusion and uncertainty among parties in workers' compensation cases about whether medical care is authorized and will "spawn" more litigation. The clear language of the statute and its bright-line allocation of responsibility for care provided by authorized providers prior to notice of a change is superior to and simpler than the majority's new unwieldy standard.

The dissent recognized that applying a bright-line standard in this case would result in Quality Egg being held liable for some medical expenses which the Commissioner ultimately found were not causally related to Ramirez-Trujillo's compensable injury. However, the dissent opined that employers have access to detailed information about their authorized providers' services and their employees' responses to treatment and are well-equipped to protect their interests under Iowa Code section 85.27(4).

LSA Monitor: Ann Ver Heul, Legal Services, (515) 281-3837.